IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 16.04.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Second Appeal No.956 of 1995

1. V.Ranga Durai
2. K.Sundarsan Pattar
3. Smt.K.Ranganayagi

... Appellants/Plaintiff

Vs.

1. S.Jayalakshmi
2. R.Sundaram

... Respondents/Defendants

PRAYER: Second Appeal under section 100 of code of Civil Procedure against the Judgment and decree dated 17.04.1995 rendered in A.S.No.26 of 1994 on the file of the First Additional Subordinate Judge, Coimbatore, reversing and decree and the judgement dated 30.11.1993 rendered in O.S.No.2290 of 1989 on the file of Third Additional District Munsif of Coimbatore.

For Appellants : M/s.S.Subbiah Manickavel
For Respondents : M/s.V.Raghavachari for
M/s.K.Moorthy
M.Karunanidhi for R1&2

J U D G M E N T

The plaintiffs in the Trial Court are the appellants in the Second Appeal. Originally the suit was filed for permanent injunction against the defendants from interfering with the enjoyment of the suit property by putting up septic tank or by laying underground pipe and thereafter included the relief of mandatory injunction to remove the construction stated to have been made by the defendants in the portion marked as A,B,C,D,E,F,G,D. The suit property itself is a lane measuring East West 45 cubits on the Eastern side and North to South 3 cubits and the property situated in Karamadai Village, Mettupalayam, Coimbatore District.

2. The plaintiffs claim to be the owners of the suit property obtained by way of registered partition deed, dated 24.02.1954 marked as Ex.A.1. The first defendant has purchased the house situated immediately on the Southern side of the suit property and they have no right of way or access through the suit property, which is a passage exclusively for the plaintiffs. Taking advantage of the fact that the suit properties are the vacant land, the defendants have attempted to interfere and subsequently

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they have also put up the septic tank and laid down underground pipe in spite of an order of injunction and therefore, the mandatory injunction was also claimed.

3. On the other hand, the defendants' case is that the suit lane is a common lane for both plaintiffs as well as the defendants. Due to the injunction order, they are not using the suit lane. It is also the case of the defendants that even before their purchase, which was on 26.10.1979 marked as Ex.B.5 the predecessors in title of the defendants have also been using for a long time as a common passage and the defendants themselves who were the tenants were using the same as a common passage to reach their portion. It is also the case of the defendants that the defendants have never prevented the plaintiffs from using the suit property to reach their property. It is also their case that they have laid the pipe line only after obtaining permission from the Panchayat and they have also left sufficient space for the purpose of plaintiffs to reach their place. The defendants have also stated that after filing of the suit, they have not put up any construction. They also denied that they have made any encroachment. It is also the case of the defendants that the plaintiffs have filed earlier suit in O.S.No.2095 of 1984 in respect of the same property and it was held on 15.02.1985 in the said suit marked as Ex.B.4 that the plaintiffs are not the owners of the property. The copy of the plaint as well as the written statement and also Commissioner's report in the said suit have been marked as Exs.B.1, B.2 and B.3. Therefore, according to the defendants, the suit is hit by principles of res judicata. After appreciation of the entire evidence and also documents, the Trial Court has decreed the suit. On the appeal filed by the defendants in A.S.No.26 of 1994, the First Appellate Court has reversed the finding of the Trial Court by dismissing the suit. It is as against the said judgement and decree of the First Appellant Court. the plaintiffs have filed the Second Appeal.

4. While admitting the Second Appeal, the following substantial question of law was framed by this Court:

> "Whether the judgement of the Lower Appellate Court is vitiated by its failure to apply the correct principles of law and consider the entire evidence on record?"

5. The contention raised by the learned counsel for the appellants is that when once the Appellate Court has come to a conclusion by referring the contents of Ex.A.1 relating to the suit property that the suit lane mentioned is in conformity with the actual lane now in existence, the further statement that there is no encroachment based on the photographs Ex.B.13 and B.14 and therefore, mandatory injunction cannot be granted, is a clear contradiction. He would also submit that while the learned First Appellate Judge on reference to the defendant's document under Ex.B.6 dated 18.04.1950 and B.5 dated 26.10.1979 has come to a definite conclusion that there is an excess construction on the

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defendant's site, has chosen to decide against the plaintiff on the basis that excess construction was admittedly on the defendant's side and it does not tally with the extent of encroachment stated in the plaint. He would also submit that the defendants themselves have taken a contradictory stand. While in the original written statement the defendants have chosen to state that the suit property is a common passage, in the additional written statement they have even denied it as a common passage. He would also fairly submit that however the Advocate Commissioner's report marked as Ex.C.1 and C.2 does not speak anything about the encroachment or identify the extent of encroachment.

6. On the other hand, Mr.V.Raghavachari learned counsel appearing for the respondents would submit that it has been the definite case of the defendants that the plaintiffs have no title. He would submit that it is not as if in the additional written statement the defendants have denied the suit property as a common passage.

7. A reference to the additional written statement filed by the defendants would show that the defendants have maintained that the suit property is a common passage.

8. He would submit that a reference to the plaint shows that there is no specific mention about the extent of encroachment alleged to have been made. According to him, when a suit for mandatory injunction is filed the duty is cast on the plaintiffs to come out clearly to the exact extent of encroachment. He would further submit that inasmuch as the plaintiff's title is disputed unless the title of the plaintiff is declared, the suit for injunction is not maintainable for which he would rely upon the Judgement of this Court reported in 2001(1) LW 724. He would also rely upon the Judgement of this Court reported in AIR 1987 Madras 102 and contended that the plaintiff has to independently establish his right and title based on his pleadings. He would also submit that even assuming that there is encroachment by putting up the septic tank and water pipe line, the plaintiff having allowed the said construction to go on, cannot be permitted to pray for the relief of mandatory injunction, by relying upon the judgement of Rajasthan High Court reported in AIR 1974 Rajasthan 144.

9. A reference to the pleadings as rightly pointed by the learned counsel for the respondents show that the plaintiffs have not come forward with definite extent of encroachment stated to have been made by the defendants. It is also seen under Ex.C.1 and C.2 Commissioner's report that there is no whisper about any encroachment stated to have been made by the defendants.

10. On the other hand, the learned Advocate Commissioner has specifically stated about the septic tank and construction as follows:

> "8. The Respondents/Plaintiffs' counsel asked me to take note of the condition of the East-west AB wall. I found it to be very

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old one. The Petitioners/Defendants counsel asked me to note whether any Septic Tank or any construction is situated in the vacant portion between points A1 C2 C3 D E F G and I, I found no such septic tank or any construction is situated in between the said points. I also saw a sun shade with a breadth of 2 feet running over the walls between points DEF and G. I also noted that no door numbers were seen over the Petitioners/Defendants 3 doors D1 D2 and D3."

11. Therefore, neither the plaint nor the Advocate Commissioner's report states anything about the extent of encroachment stated to have been made by the defendants and in view of the same, as correctly found by the learned First Appellate Judge there is no question of any mandatory injunction decree which can be passed in such circumstances. In this regard, it is relevant to point out that Order VII Rule 8 of Code Civil Procedure specifically states that when the plaintiff is seeking relief on various claims it must be with the distinct grounds. The said provision is as follows:

"8. Relief founded on separate grounds.-
Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stand as far as may be separately and distinctly."

12. It is more relevant in cases of suit for mandatory injunction for more than one reason namely, that even ultimately if the Court come to a conclusion and decree for mandatory injunction is passed unless the specific extent of encroachment distinctively stated execution itself would become impossible, with result the decree will become a nugatory.

13. It is further clear that as far as the defendants are concerned in the original written statement as well as additional written statement they have stated that the suit property is a common passage and they do not deny the right of using by the plaintiff themselves.

14. On the other hand, it is the case of the plaintiffs that they are the exclusive owners based on the documents, namely, Ex.A.1 dated 24.02.1954. On the other hand, the defendants have also relied upon the document under Ex.B.5 dated 26.10.1979 apart from the judgement in another suit filed by the plaintiff themselves in O.S.No.2095 of 1984 dismissing the claim of the plaintiff marked as Ex.A.4. In such circumstances even assuming that the decision in the said Civil Court is not relating to the present suit property, the filing of the suit for bare injunction and also mandatory injunction without having the title declared on the factual situation wherein both the parties are relying upon the documents is not maintainable.

15. The First Appellate Court has also correctly found that in the presence of earlier judgement in O.S.No.2094 of 1984 filed by the plaintiffs marked as Ex.B.4 rejecting the claim of the plaintiffs to have

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right over the suit property, the principle of res judicata applies against the present suit. As also correctly found by the learned First Appellate Judge, the Trial Court has proceeded only based on the documents and evidence of the defendants instead of appreciating that the plaintiffs who are seeking a decree for injunction as well as the mandatory injunction have neither pleaded their case specifically nor proved the same especially in the circumstance that the Advocate Commissioner's report itself is not in favour of the plaintiffs.

16. In view of the above, the substantial question of law framed by this Court is answered in favour of the respondents and the judgement and decree of the First Appellate Court is confirmed setting aside the judgement of the Trial Court and the Second Appeal stands dismissed. No cost.

nbj

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,

1. The I Addl. Subordinate Judge,
   Coimbatore

2. The III Addl. District Munsif,
   Coimbatore.

3. The Section Officer, VR Section,
   HighCourt Madras.

+1 cc to Mr.S.Subbiah, Advocate Sr.24914.

+1 cc to Mr.K.Moorthy, Advocate Sr.No.25038.

TEJ(CO)
dcp/30.05.2007 S.A.No.956 of 1995

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